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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JUNG TANG, Plaintiff, v. CHINESE CULTURE CENTER, Defendant.	Case No. KC028356 **STATEMENT OF INTEREST OF UNITED STATES** Judge: Hon. R. Bruce Minto Department: H

Pursuant to 28 U.S.C. § 517,[1] the United States, by and through undersigned counsel, respectfully submits this Statement of Interest. In doing so, the United States seeks only to protect its own interests in this matter and to advise the Court of its legal obligations under federal law. In expressing these interests, the United States neither appears on behalf of the Taiwan authorities, the Taipei Economic and Cultural

[1] Under 28 U.S.C. § 517, the United States may appear "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Representative Office in the United States ("TECRO"), or the Chinese Culture Center ("CCC"), nor takes any position with respect to the acts that brought about the judgment in this case.[2]

INTRODUCTION

The United States has learned that the bank account of the CCC was attached to satisfy a default judgment in the above-captioned case. CCC is an integral part of TECRO, which in turn is an entity of the Taiwan authorities. Pursuant to the Taiwan Relations Act ("TRA") of 1979 and the Agreement on Privileges, Exemptions, and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs,[3] (hereinafter referred to as the "AIT-TECRO Agreement"), cited in Agreements in Force as of Dec. 31, 1999 Between AIT and TECRO, 65 Fed. Reg. 81898 (Dec. 27, 2000), entered into thereunder, CCC's bank account is immune from attachment.

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[2] The United States government does not recognize Taiwan as a state or as the legal government of China. Therefore, all references to Taiwan as a "foreign state" or TECRO/CCC as a "diplomatic or consular mission" in this brief are made solely because under the Taiwan Relations Act ("TRA") of 1979, "[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." 22 U.S.C. § 3303(b)(1).

[3] In 1994, the name of the Coordination Council for North American Affairs ("CCNAA") was changed to the Taipei Economic and Cultural Representative Office in the United States ("TECRO"). See Exec. Order No. 13,014, 61 Fed. Reg. 42,963, § 2-203 (Aug. 15, 1996). Thus, CCNAA and TECRO are used interchangeably in this brief.

The United States has learned that on February 5, 2002, the Court declined to quash a writ of execution and vacate a levy on CCC's bank account after determining that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 et seq., permitted the attachment. Based on this determination, the Court held that the AIT-TECRO Agreement could not be construed to prevent attachment otherwise allowable under the FSIA. The FSIA, however, does not permit the attachment of CCC's bank account.

For purposes of the FSIA, TECRO/CCC is not an agency or instrumentality of Taiwan. Instead, it is considered part of the "foreign state", i.e., Taiwan. As a "foreign state," the FSIA only permits the attachment of TECRO/CCC's bank account if it was used for a commercial activity. TECRO/CCC's bank accounts are not used for a commercial activity as a matter of law because TECRO/CCC performs functions similar to a diplomatic or consular mission.

There is another reason that the Court should vacate the levy on CCC's bank account: the AIT-TECRO Agreement, entered into pursuant to specific congressional authorization in the TRA, provides that TECRO's bank accounts are immune from attachment. The TRA was passed in 1979, and the AIT-TECRO Agreement was entered into in 1980, and therefore, they represent subsequent federal law that supercede the FSIA to the extent of any conflict. Therefore, if the Court disagrees with the United States and finds that the FSIA otherwise would permit the attachment of CCC's account, the TRA and the AIT-TECRO Agreement

must still be enforced both as a matter of federal law and to avoid a breach of the reciprocal commitments in the AIT-TECRO Agreement.

For all of these reasons, the United States files this Statement of Interest to urge the Court to vacate the levy on CCC's bank account. The United States has a continuing interest in the interpretation of the FSIA because of the foreign policy implications of its application. See, e.g., Practical Concepts, Inc. v. Republic of Bol., 811 F.2d 1543, 1552 n.21 (D.C. Cir. 1987). The United States and the State Department also have a particular interest in ensuring that the AIT-TECRO Agreement is enforced in courts within the United States. This is in large part because the privileges and immunities extended to TECRO in the AIT-TECRO Agreement are reciprocal. Thus, the State Department must protect TECRO/CCC's accounts in the United States in order to ensure that the bank accounts of the American Institute of Taiwan ("AIT"), TECRO's counterpart, are not exposed to attachment in Taiwan. See generally 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire to the U.N., 988 F.2d 295, 300-01 (2d Cir. 1993). In addition, the United States has an interest in promoting its foreign policy and preserving its unique and sensitive relationship with the people on Taiwan through the structure established in the TRA. Application of the terms of the AIT-TECRO Agreement promotes this foreign policy objective.

Related to these interests, the State Department has duties

under the Foreign Missions Act to ensure the proper functioning of diplomatic and consular missions. See 22 U.S.C. §§ 4301 et seq. In that Act, Congress stated:

> [I]t is the policy of the United States to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions and public international organizations and the official missions to such organizations, and to assist in obtaining appropriate benefits, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law.

Id. § 4301(b). Although TECRO/CCC is not a diplomatic or consular mission as a consequence of the fact that there is no official relationship between the United States and Taiwan, TECRO performs functions similar to a diplomatic or consular mission for purposes of the United States' unofficial relationship with Taiwan. In addition, the TRA requires that TECRO be treated as a diplomatic or consular mission under the Foreign Missions Act as well as other statutes. See 22 U.S.C. § 3303(b)(1). Accordingly, the State Department has a duty to protect the proper functioning of TECRO/CCC, and thus to assist in the recognition of the privileges and immunities provided to it by the AIT-TECRO Agreement.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 1998, an individual named Jung Tang filed a complaint against the Chinese Culture Center ("CCC") in the Superior Court of California for the County of Los Angeles. The complaint alleges that CCC's negligence caused the plaintiff to slip and fall on CCC's premises. CCC did not appear in or defend

the action. Sometime thereafter, a default judgment was entered against CCC in the amount of $462,279. On November 20, 2001, the plaintiff filed an application for a writ of execution for the amount of the judgment, and on December 4, 2001, a levy was placed on CCC's bank account.

On December 11, 2001, and January 3, 2002, CCC filed Motions to Set Aside the Default Judgment and Vacate the Levy. On February 5, 2002, this Court issued an order concluding that: (1) the CCC is an agency or instrumentality of Taiwan for purposes of the FSIA, (2) the CCC is not immune from personal injury lawsuits under the FSIA, and (3) because the AIT-TECRO Agreement must be interpreted consistently with the FSIA and the International Organizations Immunity Act ("IOIA"), it cannot provide more immunity than the FSIA or the IOIA. (Order ¶¶ 1-3.) Therefore, the Order did not set aside the default judgment or vacate the levy.

It is the understanding of the United States, however, that the Court requested additional briefing and an evidentiary hearing on two factual issues related to the default judgment. The first issue was whether service of process and other papers had been proper under the FSIA. The Order relied on its finding that CCC was an agent or instrumentality of a foreign state, and thus that only substantial compliance under 28 U.S.C. § 1608(b), rather than strict compliance under § 1608(a), was required. But even under the substantial compliance standard, the Order held that actual notice of the complaint by the defendant was required

before a default judgment could be entered. (Order ¶ 6.) Therefore, discovery was allowed into the issue of whether CCC had actual knowledge of the lawsuit. (Order ¶ 6.)

Second, an evidentiary hearing was set for February 28, 2002, to determine the date that the default judgment was actually entered. (Order ¶ 9.) The Order explained that the date of entry was important because, under state law, in order to obtain a default judgment, a plaintiff must serve a statement of damages on a defendant prior to the entry of a default judgment. (Order ¶ 8.) Therefore, if the date of entry of the default judgment was before the service of the statement of damages, the default judgment would be set aside and the writ quashed. (Order ¶ 13.) Because of these outstanding issues, it is the understanding of the United States that the Court has not yet entered a final order on whether the levy on CCC's bank account should be vacated and the writ quashed.

LEGAL AND HISTORICAL BACKGROUND

Up until December 1978, the United States officially recognized the "Republic of China" ("ROC," now referred to as "Taiwan") as the sole legal government of China. In December 1978, however, President Carter announced that the United States would recognize the People's Republic of China as the sole legal government of China effective January 1, 1979, and would withdraw its official recognition of the ROC. Nonetheless, the United States sought "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and

other relations between the people of the United States and the people on Taiwan." 22 U.S.C. § 3301(a)(2). In furtherance of this goal, Congress passed the TRA. Id. §§ 3301 et seq.

The TRA establishes the statutory framework for relations with Taiwan. Of great significance, the TRA provides that "[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." Id. § 3303(b)(1). The TRA also created the AIT to conduct "[p]rograms, transactions, and other relations" with Taiwan usually carried out by the President or another federal governmental agency. See id. § 3305(a). The TRA anticipated that Taiwan would establish a counterpart entity to take actions on behalf of Taiwan. See id. § 3309(a). The TRA therefore authorized the President to extend to this entity, on a reciprocal basis, "such privileges and immunities . . . as may be necessary for the effective performance of [its] functions." Id. § 3309(c). The people of Taiwan thereafter established the Coordination Council for North American Affairs ("CCNAA") as the counterpart entity to AIT. See Exec. Order No. 12,143, 44 Fed. Reg. 37,191, § 1-204 (June 22, 1979).

Pursuant to the authority provided by the TRA, on October 2, 1980, CCNAA and AIT concluded the AIT-TECRO Agreement. The AIT-TECRO Agreement provides privileges and immunities to both entities similar to that enjoyed by certain foreign missions and their personnel and certain public international organizations

and their personnel. For example, the AIT-TECRO Agreement provides that TECRO and AIT's archives and documents are inviolable, see AIT-TECRO Agreement art. 5(c), their real property is exempt from central and local taxation, see id. art. 5(d), and their personnel acting in an official capacity are immune from suit, see id. art. 5(e). Relevant to this case, Article 5(c) of the Agreement states:

> The property and assets of [both the American Institute in Taiwan and the CCNAA while in the party's territory], and any successor organization thereto, wherever located and by whomsoever held, shall be immune from forced entry, search, attachment, execution, requisition, expropriation or any other form of seizure or confiscation, unless such immunity be expressly waived. . . . .

Id. art. 5(c).

ARGUMENT

The TRA authorized the United States, through AIT, to extend privileges and immunities to TECRO. See 22 U.S.C. § 3309(c). This was done through the AIT-TECRO Agreement, which clearly provides, inter alia, that the property and assets of TECRO are immune from attachment. See AIT-TECRO Agreement art. 5(c).

Nonetheless, a levy was placed on the bank account of CCC, which is an integral part of TECRO. The levy is thus in violation of an explicit term of the AIT-TECRO Agreement. Implicit in the February 5, 2002 Order declining to vacate the levy was a determination that the FSIA permits the attachment of CCC's bank account and thus is inconsistent with the AIT-TECRO Agreement. As established below, however, neither the FSIA nor the AIT-TECRO Agreement permit the attachment of CCC's bank

account.[4]

I. THE CHINESE CULTURE CENTER IS AN INTEGRAL PART OF TECRO THAT PERFORMS FUNCTIONS SIMILAR TO A DIPLOMATIC OR CONSULAR MISSION.

Even in the absence of diplomatic relations between the United States and Taiwan, courts have determined that TECRO performs functions similar to a diplomatic or consular mission. See Taiwan v. United States Dist. Ct. for the N. Dist. of Cal., 128 F.3d 712, 714 (9th Cir. 1997) (recognizing that TECRO "performs functions similar to the functions performed by embassies of countries with whom the United States maintains diplomatic relations"); Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment, 530 A.2d 1163, 1170-72 (D.C. Ct. App. 1987) (holding that pursuant to the TRA, TECRO must be treated as a foreign mission). See generally Sun v. Taiwan, 201 F.3d 1105 (9th Cir.), cert. denied, 531 U.S. 979 (2000). Notably, courts have also determined that AIT, TECRO's counterpart entity, performs functions similar to a diplomatic or consular mission. See Wood ex rel. U.S. v. American Inst. in Taiwan, 286 F.3d 526, ___, No. 01-5092, 2002 WL 553839, at *5

[4] The February 5, 2002 Order also indicated that the AIT-TECRO Agreement could not provide greater immunity than that provided in the IOIA. It is worth noting that certain provisions of the IOIA are incorporated into the AIT-TECRO Agreement by reference. See AIT-TECRO Agreement art. 6(b) (stating that the immunity from suit and legal process of AIT and TECRO is the same as that enjoyed by "public international organizations in the United States"). Under the IOIA, "[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments . . . ." 22 U.S.C. § 288a(b).

(D.C. Cir. Apr. 16, 2002) ("Put simply, though not an embassy, the Institute functions like one.").

The AIT-TECRO Agreement provides that TECRO could "establish branch offices in eight cities within the United States and such other additional localities as may be agreed upon by the counterpart organizations." AIT-TECRO Agreement art. 1. CCC is one of those offices. The record demonstrates the following.

CCC is one of the branch offices of TECRO. See Dec. 11, 2001 Aff. of Ding-Yuan Wang, ¶ 4; Exhs. B, E, F to Def.'s Req. for Judicial Notice of Jan. 3, 2001. CCC's full name is the Chinese Culture Center of the Taipei Economic and Cultural Office in Los Angeles. See Exhs. B, D to Def.'s Req. for Judicial Notice of Jan. 3, 2001. In addition, CCC's real property is owned by TECRO. See Exh. H to Def.'s Req. for Judicial Notice of Jan. 3, 2001. The Director and Deputy Director of CCC are employed by TECRO and are officials of Taiwan. See Dec. 11, 2001 Aff. of Ding-Yuan Wang, ¶ 3; Dec. 20, 2001 Aff. of Jason Yuan, ¶ 6. CCC does not perform functions for profit in the United States. See Dec. 11, 2001 Aff. of Ding-Yuan Wang, ¶ 9. Finally, CCC, pursuant to Article 5(d) of the AIT-TECRO Agreement and with the assistance of AIT, was granted a real property tax exemption under California law. See Exh. C to Dec. 20, 2001 Aff. of Jason Yuan (letter from County of Los Angeles to CCC informing CCC that its property was approved for "a Consular Exemption").

CCC is an integral part of TECRO, and like TECRO, performs functions similar to a diplomatic or consular mission. It is for

this reason that the AIT-TECRO Agreement provides the same privileges and immunities to CCC, including immunity from attachment for its assets. See AIT-TECRO Agreement art. 5(c).

II. THE FSIA PROHIBITS ATTACHMENT OF TECRO/CCC'S BANK ACCOUNT.

As a general matter, the FSIA provides that "the property in the United States of a foreign state shall be immune from attachment[,] arrest and execution except as provided in section 1610 and 1611 of this chapter." See 28 U.S.C. § 1609 (emphasis added). Sections 1610 and 1611 provide a number of exceptions to this general rule, some of which apply only to agencies and instrumentalities of foreign states and not foreign states themselves. Compare id. § 1610(a) (applying to foreign states as defined by 28 U.S.C. § 1603(a)), with id. § 1610(b) (applying only to agencies and instrumentalities of foreign states). Therefore, in order to determine whether the FSIA by its own terms would permit attachment of TECRO/CCC's bank account, the first inquiry is whether TECRO/CCC is the foreign state, i.e., Taiwan, or an agency or instrumentality of Taiwan for purposes of the FSIA.

A. TECRO/CCC is not an Agency or Instrumentality of Taiwan For Purposes of the FSIA.

Under the FSIA, an agency or instrumentality is defined as:

> [A]ny entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). While not dismissing an inquiry into the legal and structural characteristics of an entity for purposes of whether it is an agency or instrumentality, courts have stressed that entities that perform inherently governmental functions such as embassies and consulates presumptively must be considered part of a foreign state and not an agency or instrumentality. See Underwood v. United Republic of Tanz., No. 94-902, 1995 WL 46383, at *2 (D.D.C. Jan. 27, 1995); Berdakin v. Consulado de law Republica de El Sal., 912 F. Supp. 458, 461 (C.D. Cal. 1995) (citing Gerritsen v. Hurtado, 819 F.2d 1511, 1517 (9th Cir. 1987)); Gray v. Permanent Mission of People's Republic of Congo to the U.N., 443 F. Supp. 816, 820 (S.D.N.Y.), aff'd, 580 F.2d 1044 (2d Cir. 1978) (unpublished mem.); Segni v. Commercial Office of Spain, 650 F. Supp. 1040, 1042 (N.D. Ill. 1986); 2 Tudor City Place Assocs. v. Libyan Arab Republic Mission to the U.N., 121 Misc. 2d 945, 946-47 (N.Y. Civ. Ct. 1983).

For example, the Underwood court held that, as a matter of law, embassies are not agencies or instrumentalities of foreign states for purposes of FSIA because "[t]he functions of an embassy are so integrally related to the core functions of government that it qualifies as part of the foreign state . . . regardless of whether the embassy has a separate name and some power to conduct its own affairs." 1995 WL 46383, at *2. Under this rationale, TECRO/CCC is not an agency or instrumentality of Taiwan because of the functions that it performs.

In addition, the D.C. Circuit has held that "[TECRO] enjoys

the same immunity under the FSIA as do other nations." See Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879, 883 (D.C. Cir. 1988); see also id. (stating that TECRO "rather than being a subject or citizen of Taiwan, is Taiwan"). For all of these reasons, TECRO/CCC is properly considered Taiwan for purposes of the FSIA, rather than an agency or instrumentality of Taiwan.[5]

[5] The United States recognizes that TECRO has been referred to in other contexts as an "instrumentality." See, e.g., 22 U.S.C. § 3309; Exec. Order No. 12,143, 44 Fed. Reg. 37191, § 1-204 (June 22, 1979); Exec. Order No. 13,014, 61 Fed. Reg. 42963, § 2-203 (Aug. 15, 1996). These references do not purport to establish that TECRO is an "instrumentality" for purposes of the FSIA. In fact, the FSIA has its own specific statutory definition of an agency or instrumentality, which has been interpreted by courts not to include diplomatic or consular missions. A statutory definition (and thus its judicial interpretation) that declares what a term "means" excludes all other possible meanings. See Colautti v. Franklin, 439 U.S. 379, 392-93 & n.10 (1979). Therefore, these references are irrelevant to a determination of whether TECRO is an instrumentality for purposes of the FSIA. In other words, TECRO may be considered an "instrumentality" for the purposes of one statute, such as the TRA, but not an instrumentality for purposes of another statute, such as the FSIA. See, e.g., Millen, 855 F.2d at 883.

There are a few cases, however, that refer to TECRO as an instrumentality without specifying whether it is an instrumentality exclusively under the TRA or also under the FSIA. See, e.g., Taiwan, 128 F.3d at 715; Sun v. Taiwan, 201 F.3d 1105, 1107 (9th Cir.), cert. denied, 531 U.S. 979 (2000). Moreover, in neither of these cases was the court's description of TECRO as an instrumentality necessary for the decision. For example, in Taiwan, the court was construing § 1605(a)(2) of the FSIA, see 128 F.3d at 715, which makes no distinction between foreign states and instrumentalities of foreign states, see 28 U.S.C. §§ 1605(a)(2), 1603(a). As such, the court's description of TECRO as an instrumentality of Taiwan was dicta, and neither the United States nor the Court is bound by it.

B. The Bank Accounts of TECRO/CCC Are Not Used for a Commercial Activity as a Matter of Law.

Once it has been established that TECRO/CCC is not an agency or instrumentality of Taiwan for purpose of the FSIA, § 1610(a), and not § 1610(b), applies. Under § 1610(a), CCC's bank account can be attached only if certain criteria are satisfied, the threshold requirement being that property of a foreign state is attachable only if it is used for a commercial activity in the United States.[6] See 28 U.S.C. § 1610(a). Section 1610(a) provides, in relevant part:

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . .

Id. (emphasis added). Thus, the next inquiry is whether the property at issue--CCC's bank account--was used for a commercial activity.

Courts have held that as a matter of law bank accounts of diplomatic and consulate missions are not used for a commercial activity. See Trans Commodities, Inc. v. Kazakhstan Trading House, S.A., No. 96-316, slip op. at 4 & n.3 (D.D.C. Feb. 27,

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[6] The FSIA defines a commercial activity as:

> [A] regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

1997); Sales v. Republic of Uganda, No. 90-3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993); Liberian E. Timber Corp. v. Government of the Republic of Liber., 659 F. Supp. 606, 609-10 (D.D.C. 1987). See generally H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 6604, 6615 (indicating that employment of diplomatic personnel is a governmental activity, not a commercial one). But cf. Birch Shipping Corp. v. Embassy of the United Republic of Tanz., 507 F. Supp. 311, 312 (D.D.C. 1980).

The Liberian court explained that "the rule of thumb . . . to determine whether activity is of a commercial or public nature is if the activity is one in which a private person could engage, it is not entitled to immunity." 659 F. Supp. at 610 (citations and internal quotation marks omitted). The bank accounts at issue in that case were utilized for the "maintenance of the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States . . . ." Id. Thus, "[t]he essential character of the activity for which the funds in the accounts [were used was] undoubtedly of a public or governmental nature because only a governmental entity may use funds to perform the functions unique to an embassy." Id. Finally, the court declined to scrutinize the accounts to determine whether some of the funds might be used for incidental commercial activities, instead concluding that such a determination would be unduly intrusive and contrary to the purposes of sovereign immunity. See id.

Like diplomatic and consular bank accounts, real property used to house an embassy or consulate also is not considered to be used for a commercial activity.[7] See H.R. Rep. No. 94-1487, 1976 U.S.C.C.A.N. at 6628 ("[E]mbassies and related buildings [cannot] be deemed to be property used for a commercial activity,"); MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 920 (D.C. Cir. 1987) (agreeing that "operation of a chancery is, by its nature . . . governmental, not commercial") (internal citation omitted); City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31, 36-37 (3d Cir. 1985) (same); United States v. County of Arlington, 702 F.2d 485, 488 (4th Cir. 1983) (same); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 22-23 (D.D.C. 1999) (holding that embassies and residences of diplomats support diplomatic relations, an inherently sovereign, and not commercial, activity); S&S Mach. Co. v. Masinexportimport, 802 F. Supp. 1109, 1111-12 (S.D.N.Y. 1992) (indicating that consulate building was not used for commercial activity because only a sovereign can operate a consulate).

Moreover, courts have generally held that "[t]he concept of commercial activity should be defined narrowly because sovereign immunity remains the rule rather than the exception, and because courts should be cautious when addressing areas that affect the

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[7] There is also a specific exception for real property that is used to maintain "a diplomatic or consular mission or the residence of the Chief of such mission[.]" 28 U.S.C. § 1610(a)(4)(B).

affairs of foreign governments." Liberian, 659 F. Supp. at 610 (citation and internal quotation marks omitted).

Under § 1610(a), CCC's bank account is immune from attachment because it was used to support offices that perform functions similar to those performed by a diplomatic or consular mission, which is not a commercial activity as a matter of law.[8] The conclusion is that the FSIA, like the AIT-TECRO Agreement, does not permit the attachment of CCC's bank account.

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[8] If the Court were to agree that TECRO/CCC is a part of the "foreign state," but somehow determined that CCC's bank account is used for a commercial activity, the attachment would still only be proper if one of the seven subsections of § 1610(a) applies. The two possibly relevant sections are (a)(1) or (a)(5):

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . .
> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or . . .
> (5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment . . . .

28 U.S.C. § 1610(a). Neither of these provisions appears to apply in this instance. Moreover, even if the Court were to determine that TECRO/CCC is an instrumentality of Taiwan for purposes of the FSIA, attachment would only be proper if, inter alia, TECRO/CCC engaged in commercial activity. See id. § 1610(b).

III. EVEN IF THE FSIA PERMITTED THE ATTACHMENT OF CCC'S BANK ACCOUNT, THE TRA AND THE AIT-TECRO AGREEMENT DO NOT AND THEY MUST BE ENFORCED.

As a preliminary matter, if the Court finds that there is a potential conflict between (1) the FSIA and (2) the TRA and the AIT-TECRO Agreement, the Court must attempt to harmonize these federal law provisions. See United States v. Vasquez-Velasco, 15 F.3d 833, 840 (9th Cir. 1994) (citing the Restatement (Third) of Foreign Relations Law § 114 (1987) as requiring that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law"). As explained above, there is no conflict between the FSIA and either the TRA or the AIT-TECRO Agreement. But to the extent that the Court believes that there is, the Court should attempt to harmonize them by looking to their respective texts and purposes. See Rodriguez v. United States, 480 U.S. 522, 524-25 (1987).

As a general matter, the legislative history of the FSIA indicates that the FSIA was not to be construed to affect diplomatic or consular immunity. See H.R. Rep. No. 1487, 1976 U.S.C.C.A.N. at 6610. More specifically, in passing the FSIA, Congress made clear that international agreements entered into prior to the FSIA's passage were to be applied in accordance with their terms. See 28 U.S.C. §§ 1604, 1609. This necessarily included a number of international agreements governing the privileges and immunities of both diplomatic or consular missions and public international organizations. See, e.g., Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (Apr. 18,

1961); Convention on Privileges and Immunities of the U.N., 21 U.S.T. 1418, 1 U.N.T.S. 16 (done Feb. 13, 1946, entered into force for the United States on Apr. 29, 1970). Congress also wanted to ensure that the FSIA be made subject to future agreements, but deleted as unnecessary a proposal to this effect. See H.R. Rep. No. 1487, 1976 U.S.C.C.A.N. at 6608. Congress recognized that regardless of an express provision, under established law, a later-enacted agreement would take precedence over an earlier statute. See id. In passing the FSIA, it is clear that Congress did not intend to allow the FSIA to interfere in any way with the immunities afforded to diplomatic or consular missions both before and after passage.

Subsequent to the FSIA's passage, Congress passed the TRA, which was intended "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan" via the unique arrangement set forth in the statute. See 22 U.S.C. § 3301(a)(2); id. §§ 3301 et seq. It specifically authorized the President to extend to TECRO "such privileges and immunities . . . as may be necessary for the effective performance of [TECRO's] functions."[9] Id. § 3309(c).

[9] Since the passage of the TRA, language in the Vienna Convention on Diplomatic Relations of 1961 similar to that in § 3309(c) has been construed to prohibit the attachment of bank accounts of diplomatic missions. See Foxworth v. Permanent Mission of the Republic of Uganda to the U.N., 796 F. Supp. 761, 763 (S.D.N.Y. 1992); Liberian, 659 F. Supp. at 608. The primary language is in Article 25, which states that "[t]he receiving State shall accord full facilities for the performance of the

After the AIT-TECRO Agreement was entered into and immunity from the attachment of its assets was extended to TECRO, it was submitted to the Congress in accordance with the TRA. See 22 U.S.C. § 3311(a). AIT-TECRO agreements are required by statute to be transmitted to Congress in the same manner as international agreements by the United States. See id.

In attempting to harmonize the FSIA and the TRA/AIT-TECRO Agreement, it should also be recognized that the language of the TRA and the AIT-TECRO Agreement are quite specific in prohibiting the attachment of TECRO's property, whereas the language of the FSIA is general. See United States v. Shewmaker, 936 F.2d 1124, 1127 (10th Cir. 1991) (citing Townsend v. Little, 109 U.S. 504, 512 (1883)). For all of these reasons, the Court should harmonize any perceived difference between the FSIA and the TRA/AIT-TECRO Agreement to prohibit the attachment of CCC's bank account, as both Congress and the President intended.

If there remains any possibility that (1) the FSIA, passed in 1976 and, (2) the TRA, passed in 1979, and the AIT-TECRO Agreement, signed in 1980, cannot be harmonized, the provisions of the TRA and the AIT-TECRO Agreement still must be applied in accordance with their terms and, as such, to prevent the attachment of CCC's bank account. This is because where provisions in two acts are in irreconcilable conflict, the later one constitutes an implied repeal of the earlier one to the extent of the conflict. See Posadas v. National City Bank of

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functions of the mission." 23 U.S.T. 3227, 3238 (Apr. 18, 1961).

N.Y., 296 U.S. 497, 503 (1936). In general, an international agreement entered into pursuant to congressional authority also implicitly repeals inconsistent earlier legislation to the extent of a conflict. See, e.g., Restatement (Third) of Foreign Relations Law, § 115 cmt. c (1987); Dames & Moore v. Regan, 453 U.S. 654, 674 (1981). Although the AIT-TECRO Agreement is not an international agreement, the TRA requires the AIT-TECRO Agreement to be treated as such. See 22 U.S.C. §§ 3303,[10] 3305(b),[11] 3311(a).[12] See generally Taiwan, 128 F.3d at 717 (giving effect

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[10] Section 3303 reads, in pertinent part:

> The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979 . . . . [and whenever] the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan. . . .").

22 U.S.C. § 3303.

[11] Section 3305(b) reads:

> Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

22 U.S.C. § 3305(b).

[12] Section 3311 requires the Secretary of State to transmit to Congress "the text of any agreement to which the Institute is a party." 22 U.S.C. § 3311(a). In addition, "Agreements and transactions made or to be made by or through the Institute shall be subject to the same congressional notification, review, and

to the AIT-TECRO Agreement). Under these authorities, the TRA and the AIT-TECRO Agreement would supersede the FSIA to the extent that the FSIA would permit the attachment of CCC's bank account.

CONCLUSION

For the foregoing reasons, CCC's bank account is not attachable, and the levy on it should be vacated.

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approval requirements and procedures as if such agreements and transactions were made by or through the agency of the United States Government on behalf of which the Institute is acting." Id. § 3311(c).

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2002, I sent, via first class mail, postage pre-paid by sealed envelope, a copy of Statement of Interest of United States, with Appendix of Cases, Statutes, and Other Authority, addressed to:

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